NO. 21281

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH MALDONADO VASQUEZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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BRIEF OF APPELLEE

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On March 23, 1966, the Federal Grand Jury for the Southern District of California returned a two-count indictment against the appellant charging him with knowingly and unlawfully receiving, concealing, and selling a narcotic drug in violation of Title 21, United States Code, Section 174 [C. T. 2-3]. 1/

Pursuant to a plea of not guilty, trial by jury commenced on May 31, 1966 [R. T. 11]. 2/ The jury returned a verdict of guilty

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1/ "C. T." refers to Clerk's Transcript.

2/ "R. T." refers to Reporter's Transcript.

on both counts (violations of Title 21, U.S.C. Section 174), on June 3, 1966 [R.T. 161-162].

Count One charged:

> On or about October 4, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant JOSEPH MALDONADO VASQUEZ knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of 3.260 grams of heroin, a narcotic drug, which, as the defendant then and there well knew, previously had been imported into the United States of America contrary to United States Code, Title 21, Section 173.

Count Two charged:

> On or about October 4, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant JOSEPH MALDONADO VASQUEZ knowingly and unlawfully sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics 3.260 grams of heroin, a narcotic drug, which, as the defendant then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 173.

On June 28, 1966, Judge Francis C. Whelan committed appellant to the custody of the Attorney General for concurrent

terms of six years on each count [C. T. 4].

Timely notice of appeal was filed on July 5, 1966 [C. T. 5].

Jurisdiction of the District Court was based upon Title 28, United States Code, Section 3231.

Jurisdiction of this Court is based upon Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 173, reads as follows:

> "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.
>
> "Any narcotic drug imported or brought into the United States or any territory under its control or

jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

Title 21, United States Code, Section 174, reads as follows:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after

being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III

QUESTIONS PRESENTED

1. DID THE COURT ABUSE ITS DISCRETION IN FAILING TO EXCLUDE A GOVERNMENT AGENT FROM THE COURTROOM?
2. WAS APPELLANT ENTRAPPED AS A MATTER OF LAW?
3. IS THE EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT?

IV

STATEMENT OF FACTS

For some time prior to October 4, 1965, Federal Bureau of Narcotics Agents had been aware, through "word on the street",

that a certain individual was active in the traffic of narcotic drugs in the general area of First and Breed Streets, Los Angeles [R. T. 100].

Shortly before October 4, 1965, Robert Luna informed Federal Bureau of Narcotics Agents Celaya and Watson that appellant was selling heroin in the First and Breed Streets area and offered to see what he could do to make a purchase from appellant [R. T. 59]. Luna, who had known the appellant for approximately a month, was aware that the appellant was engaged in the business of selling heroin in the area from appellant's sales to acquaintances of Luna [R. T. 57], and from prior purchases from appellant by Luna [R. T. 59]. On October 4, 1965, Luna saw appellant on the street and asked to buy a quarter ounce of heroin. The appellant promptly agreed to sell it to Luna. A meeting was then arranged for the purpose of completing the sale of the heroin [R. T. 58]. Later the same day, after having notified Agents Celaya and Watson, Luna purchased 3. 260 grams of heroin from appellant while under the surveillance of the agents [R. T. 51, 88].

Appellant was identified at the trial as the person from whom Luna purchased the heroin by both Luna [R. T. 48-49], and Celaya [R. T. 89].

Appellant was also identified as the individual who was actively engaged in the sale of heroin in the area of First and Breed Streets, Los Angeles, by Luna [R. T. 57, 84], and Celaya [R. T. 99-100].

V

ARGUMENT

A. DENYING OF APPELLANT'S MOTION TO EXCLUDE A WITNESS WAS NOT ERROR.

At the beginning of the trial, appellant moved to exclude witnesses from the courtroom. The trial judge then indicated that he would allow one Government agent to remain if the Government needed him and asked the Government counsel whether the agent's presence was necessary. The reply was affirmative and the agent was allowed to remain [R. T. 45]. Appellant contends that this ruling was an abuse of discretion.

It is axiomatic that exclusion of a witness is a matter within the discretion of the trial court and the exercise of that discretion will not be disturbed unless there is a clear abuse apparent from the record. United States v. Infanzon, 235 F. 2d 318 (2nd Cir. 1956); Portomene v. United States, 221 F. 2d 582 (5th Cir. 1955); Powell v. United States, 208 F. 2d 618 (6th Cir. 1953), cert. denied, 347 U.S. 961 (1953).

In similar situations, it has been held that allowing a Government agent to remain in the courtroom during the testimony of other witnesses, even though the agent later testified, is not an abuse of discretion. Roberson v. United States, 282 F. 2d 648 (6th Cir. 1960); Portomene v. United States, supra.

Moreover, absent a showing of manifest prejudice to the defendant, the refusal to exclude witnesses on the ground that the

defense is "mistaken identity" is not an abuse of discretion, and would be harmless error even assuming that the refusal was erroneous. Kaufman v. United States, 163 F. 2d 404 (6th Cir. 1947); see Laird v. United States, 252 F. 2d 121 (4th Cir. 1958); 18 U. S. C., Rule 52(a).

That an opportunity for matching narratives is presented by the failure to exclude a witness does not automatically constitute prejudice to the defendant, nor does it compel a finding that the trial court abused its discretion. See Roberson v. United States, supra; Powell v. United States, supra. Noticeably, appellant cites no case in which it was determined that a Government agent must be excluded by the trial court if failure to do so will present an opportunity for matching narratives. In fact, each case cited by appellant stands for the proposition that the trial court's discretion will not be disturbed unless a clear abuse is shown and that no such showing was made.

Appellant contends that the trial court abused its discretion by failing to require the appellee to show the necessity of the agent's presence. No authority is cited for this proposition, and no case has been found which holds that it is an abuse of discretion for the trial court to fail to require such a showing.

Appellant did not seek to be heard further on his motion for exclusion of witnesses after the court granted it in part, although the court had not forestalled that opportunity. It is evident from the record that the appellant cannot now assert that he was not afforded the opportunity to be heard.

In any event, appellant does not advert to any evidence, other than the relatively consistent testimony of Luna and Agent Celaya, to buttress his conclusion that he was prejudiced. In view of the overwhelming evidence against appellant, it is clear that no manifest injustice or prejudice resulted from the court's ruling, and assuming arguendo that the ruling was erroneous, only a harmless error has been shown, and no miscarriage of justice has resulted.

B. THE EVIDENCE DOES NOT ESTABLISH ENTRAPMENT AS A MATTER OF LAW.

The leading case of Sherman v. United States, 356 U.S. 369 (1958), expresses the aim of the courts in dealing with the entrapment issue, as follows:

> "To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." 356 U.S. at 372.

In drawing this line, a material consideration is whether there is significant evidence that a defendant was in the trade. Id. at 375.

Another factor to consider is:

> " . . . [T]he nature of the crime involved, its secrecy and difficulty of detection, and the manner in which the

particular criminal business is carried on." Id. at 385.

In the instant case, the record clearly demonstrates the willingness and readiness of the appellant, as a professional heroin seller, to commit the crime. His predisposition is evidenced by the alacrity with which the informer's offer to buy was accepted [R. T. 49, 58]. Additionally, the second factor mentioned in Sherman is present here, since the offense (sale of narcotics) is difficult to detect and secret transactions are typical of the manner in which this criminal business is conducted.

Once the defense of entrapment has been raised, according to the First Circuit Court of Appeals, two issues must be considered: Inducement and predisposition.

> "On the other hand, the mere fact that the opportunity to commit the offense was afforded to a man waiting for such an opportunity does not mean that the government was the effective cause of his criminal conduct. The question is, who generated it? Thus, in every case of entrapment there are two possible issues. (1) Did the government put in motion this particular offense; and (2) did it initiate the defendant's criminal state of mind, or only activate it? The first issue is called inducement; the second is considered in terms of defendant's predisposition."
>
> Sagansky v. United States, 358 F. 2d 195, 202 (1st Cir. 1966).

Although the government induced defendant's act, entrapment as a defense will be precluded if defendant's predisposition to commit the offense is proved beyond a reasonable doubt.

> "If, . . . there was inducement as a matter of law, then only the question of predisposition is submitted to the jury and the government has the burden of proving it beyond a reasonable doubt."

Id. at 203; see also Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966).

Applying this analysis to the present case, even though appellant was induced by the Government, it is manifest from the record that he was no unwary innocent. On the contrary, he was so eager to engage in the illegal transaction that one casual request, one offer to buy, made in mid-afternoon on a busy street corner without any preliminary conversation was sufficient to induce the appellant to commit the criminal acts [R. T. 49, 58]. This fact is uncontroverted, as the record indicates. Appellant did not offer at the trial any evidence to negate the inferences arising from appellant's immediate agreement to deliver heroin to the informer for a price. It is submitted that this fact alone indicates appellant's predisposition to commit the crime.

Appellant ignores the predisposition issue in his brief, but asserts error by contending that no probable cause for the inducement existed. In support of this contention, appellant relies upon the first Whiting case, Whiting v. United States, 296 F. 2d 512 (1st Cir. 1958), which holds that the Government could not introduce

hearsay in rebuttal to establish that before the defendant was approached, the Government had legally adequate evidence of his predisposition to sell narcotics.

After a second trial in which no hearsay was offered, the case was again before the First Circuit Court of Appeals in Whiting v. United States, 321 F.2d 72 (1963), cert. denied, 375 U.S. 884 (1963). In affirming the conviction, the court rejected defendant's contention that it is per se improper conduct by the Government to offer inducement without prior good reason to suspect guilt.

> "We do not agree. Solicitation to commit a crime does not in itself involve constitutional rights, and is not comparable to the arrest of a person or to the invasion of premises." Id. at 74.

And, the court held, " . . . [I]t is not offensive conduct for the Government to initiate inducement without a showing of probable cause." Id. at 77.

The second Whiting case rejects the contention raised in this appeal, and holds that although inducement was offered, if no corruption of appellant resulted, he was not illegally entrapped. Moreover, even under the first Whiting decision, appellant's conviction must be affirmed, since here, unlike the facts of that case, the record reveals substantial admissible evidence to support a finding that the Government had probable cause to suspect appellant as a narcotics dealer.

Even if the first Whiting case were pertinent, the rule in this Circuit is to the contrary. It has long been held by the Ninth

Circuit Court of Appeals that hearsay is admissible to establish both probable cause for inducement and predisposition. In Trice v. United States, 211 F. 2d 513 (9th Cir. 1954), cert. denied, 348 U.S. 900 (1954), the Court affirmed a conviction for the unlawful sale of narcotics. In the court below, Judge Mathes had permitted the Government to introduce in rebuttal the uncorroborated testimony of a Government agent that he had heard from various sources that defendant was involved in the sale of narcotic drugs. There was no evidence that the defendant had ever been arrested, charged with, or convicted of a violation of Federal or State narcotics laws. Appellant contended that the evidence regarding inducement and predisposition was hearsay and too remote in time to be admissible. The Court rejected this contention, holding that "hearsay evidence, in the circumstances, was proper" and that it was not so remote as to be inadmissible. 211 F. 2d at 519.

Another important distinguishing factor from the first Whiting case should be noted. In Whiting, as in Trice, the hearsay was offered by the Government in rebuttal. Here, the hearsay was elicited by appellant on cross-examination.

Counsel for the appellant asked Luna, the informer, whether he had offered to buy heroin from appellant "just out of the blue" [R. T. 56-57]. Luna responded by relating factors upon which he based his conclusion that appellant was a dealer. Assuming without conceding that Luna's response was hearsay (since it did not prove the truth of the statements but only the informer's state of mind and appellant's predisposition), appellant is bound by the

response to his question. See Wigmore, Evidence §18 (1940). Luna also testified, in response to appellant's question, that he had purchased heroin from appellant before, and knew others who had done the same [R. T. 59]. Later, in response to appellant's questions, Agent Celaya testified that he had been informed, through word on the street, that appellant was in the business of selling heroin. Appellant made no motion to strike this response [R. T. 99-100].

From the foregoing, it is submitted that not only was probable cause for the inducement established by admissible evidence, but the evidence is clearly sufficient to establish beyond a reasonable doubt defendant's predisposition to commit the crime. Evidence of prior sales to Luna [R. T. 59], and others [R. T. 57], and the information received from others that appellant was a dealer [R. T. 99-100], justifies the inducement and is sufficient to establish beyond a reasonable doubt that appellant was not corrupted by that inducement. The uncontroverted testimony regarding the circumstances surrounding the transaction and the events leading up to it precludes a determination that appellant was entrapped as a matter of law.

C. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Appellant does not recite, and no such recital is possible, that a motion for acquittal on the ground asserted herein, or on any ground, was made by appellant at any time. 18 U.S.C., Rule 29.

It is uniformly held that absent a motion for judgment of acquittal at the close of all the evidence, the sufficiency of the evidence will not be reviewed unless the verdict is palpably wrong. Maxfield v. United States, 360 F. 2d 97 (10th Cir. 1966). And, it is frequently said that the sufficiency of the evidence will only be reviewed, where no motion has been made, to avoid a manifest miscarriage of justice. A miscarriage of justice would exist only if it appears that the record is devoid of evidence pointing to guilt. Garrett v. United States, 356 F. 2d 921 (5th Cir. 1966). It almost goes without saying that the record in the instant case shows substantial evidence pointing to defendant's guilt. In fact, the evidence of his guilt is overwhelming.

Appellant attempts to show that because of the witnesses' mistaken belief as to his name, there was no identification of him as the person who committed the acts. To buttress this contention, appellant refers to the Analyzed Evidence Report bearing the name "Joseph M. Masuda" and the testimony of Agent Celaya that another "Mazuto" appeared in the records [Appellant's Brief, 10-11]. The record, however, does not support this contention that the identity of the appellant was not established. The informer, Mr. Luna, testified that the appellant, who was sitting in the courtroom, was the person who sold and delivered the narcotics to him [R. T. 48-49]. Likewise, the Government Agent, Mr. Celaya, identified the appellant [R. T. 89]. Luna expressly testified that the appellant, although known to Luna as "Joe" and "Joe Mazuto", was the specific individual who was then sitting at the defense table

and who was the person involved in the transaction on October 4, 1965 [R. T. 48-49, 85].

As mentioned above appellant argues that the record does not disclose any connection between the Analyzed Evidence Report, Government Exhibit No. 1, and the appellant because of the mistake as to appellant's real name. The record reflects Luna's testimony that Government Exhibit No. 1 was received from the man identified in court as the appellant [R. T. 53]. Agent Celaya testified that Exhibit No. 1 was received from Luna shortly after it came into Luna's possession and that Luna was under surveillance during the period of his possession [R. T. 88]. At that time, Luna and the agents thought the man from whom it was received was named "Joe Mazuto", or "Masuda", which is why the evidence report bears that name.

However, whether this particular man, appellant Vasquez, was known by the name or names of "Joe", "Mazuto", or any other, is immaterial to the identification of him as the particular person involved in the transaction for which he was convicted.

When considering the sufficiency of the evidence, an appellate court must view the evidence taken at trial in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942).

If the court then finds substantial evidence, it must presume the findings of the trier of fact to be correct, and the judgment must be sustained. Noto v. United States, supra; Ingram v. United States,

360 U.S. 672, 678 (1959).

The credibility of witnesses and the weight to be given their testimony is a matter within the province of the trier of fact. Stoppelli v. United States, 183 F. 2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950).

The record before this Court discloses more than substantial evidence to support the verdict.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be approved.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

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